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In the Supreme Court of the United States

OCTOBER TERM, 1975

LARRY MEACHUM, ET AL., PETITIONERS

v.

ARTHUR FANO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the question whether the Due Process Clause requires notice and opportunity for hearing on the propriety of a transfer of a prisoner between prisons of different security classifications.[1]

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[1] We do not discuss the question whether, if the Due Process Clause applies, the particular procedures followed by the state officials in this case were adequate. Nor do we discuss the court of appeals' argument (Pet. App. 35-36) that the Equal

INTEREST OF THE UNITED STATES

Like *Montanye* v. *Haymes*, No. 74-520, certiorari granted, 422 U.S. 1055, the instant case presents questions regarding the procedures prison officials must follow when deciding to move inmates from one place of incarceration to another. Although this case involves only the practices of prisons in a single state, the Court's decision may directly affect the existing practices and procedures for management and control of prisoners in other prison systems, including the federal prison system. Our interest in this case is similar to that expressed at pages 1-4 of our brief *amicus curiae* in *Montanye*.[2]

Unlike *Montanye*, this case involves transfers between institutions of different custody levels. The United States has a particular interest in that element of the case because, unlike some States, the federal government maintains a prison system in which prisoners are confined at various levels of custody according to the nature of the offense committed, the character and mental condition of the prisoner, and the prisoner's discipline, care, and treatment needs. Federal prisons are broadly divided into minimum,

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Protection Clause requires administrators to use identical procedures in all prisons. As to the latter, however, we observe that if the court of appeals were correct, it would be impossible to experiment with different procedures in different prisons in order to analyze the effects of each; every prisoner would acquire an entitlement to the most favorable procedure in effect at any prison, and experimentation and change would be discouraged.

[2] We are furnishing the parties' counsel with copies of that brief.

medium, and maximum security institutions; other prisons serve special populations such as youthful offenders and narcotics addicts.

During fiscal year 1975, 518 inmates in the federal prison system were transferred from medium security institutions to maximum security institutions, and 621 inmates were transferred from minimum security prisons to medium or maximum security institutions. Numerous prisoners also were transferred within a single prison to different work and rehabilitative programs; many of these latter transfers resulted in consequences to the inmate similar to those that would occur as a result of transfers between institutions of different security classifications.[3]

STATEMENT

1. Between August 13, 1974, and October 23, 1974, nine serious fires[4] were set in the Massachusetts Correctional Institution at Norfolk, a medium security institution. Prison officials received information from

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[3] Each institution has within it different degrees of that custody level: close, medium, and minimum. "Close custody" usually entails restriction to the prison's security perimeter; "medium custody" means that the inmate may work outside the security perimeter under direct supervision; "minimum custody" means that the inmate may work outside of the security perimeter under periodic checks. A prisoner in minimum custody at a maximum security institution may therefore enjoy conditions less restrictive than those imposed upon a prisoner in close custody at a medium security institution.

[4] Firemen from outside the prison had to be summoned to extinguish the fires.

informants that certain inmates were responsible for the fires and for other disturbances in the prison. Those inmates, including respondents, were taken from the general population and placed in the Receiving Building, an administrative detention area used to process new inmates.[5]

On October 25, 1974, each respondent was given a disciplinary report setting forth the reasons for his removal from the general population.[6] On November 4, 1974, each respondent was given notice of an impending classification hearing. The notice stated: (1) that following the classification hearing a recommendation concerning the inmate's institutional status or transfer would be made; (2) that the inmate would be confined in "an awaiting action area" pending the hearing; and (3) that information had been received accusing the inmate of certain illegal activities. Some prisoners were accused of possessing weapons or ammunition, others with involvement in the planning and execution of one or more of the serious fires, and still others with trafficking in narcotics (Pet. App. 18, 24).

Individual classification hearings were held for the respondents in early November. Each respondent was

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[5] The facts of this statement are taken from the opinion of the district court (Pet. App. 16-20). The facts stated by the court were taken from a pretrial stipulation.

[6] The offenses charged were referred to the local district attorney for possible prosecution. In conformity with Massachusetts prison regulations no disciplinary proceedings were held. See Pet. App. 29, n. 1.

represented by counsel. The classification board opened each hearing by reading a prepared statement. The respondent was then ordered to leave the room while the board heard the informants' testimony, relayed by petitioner Superintendent Larry Meachum, after which the respondent was brought back into the room and informed that the informants' testimony supported the charges contained in the notice. The respondent was allowed to present evidence on his own behalf, and each denied involvement in the particular infraction charged. Several respondents also presented testimony and written statements on their behalf from corrections officers. The board also heard testimony from each respondent's social worker.

The board recommended that respondent Royce be placed in administrative segregation for 30 days, after which a second classification hearing would be held. The board recommended that respondents Fano, Dussault, and McPherson be transfered to Walpole, a maximum security prison, and that respondents DeBrosky and Hathaway be transferred to Bridgewater, a prison with both maximum and medium security sections. Respondents were not given a written statement of the board's reasons or of the evidence on which the board relied. They were orally informed that the recommendations were based upon information provided by informants. The information was not disclosed even in summary form, nor were the names of the informants provided.

The board's recommendations were reviewed personally by petitioner William Dawber, then Acting

Deputy Commissioner for Classification and Treatment, and by petitioner Frank Hall, Commissioner of Corrections. The board's recommendations as to respondents Fano, Dussault, Hathaway, and McPherson were accepted. Respondent DeBrosky was ordered to be transferred to Walpole instead of Bridgewater. Respondent Royce was ordered to be transferred to Walpole instead of being placed in administrative segregation.

Respondents were not subjected to disciplinary punishment upon arrival at their new prisons. They suffered neither loss of good time nor confinement in disciplinary segregation.

2. On December 12, 1974, respondents filed an amended complaint [7] in the United States District Court for the District of Massachusetts. It named as defendants Superintendent Meachum, Commissioner Hall, and Acting Deputy Commissioner Dawber, individually and in their official capacity. The complaint, brought under 42 U.S.C. 1983, charged that petitioners had violated the Constitution by placing respondents in segregation cells without prior notice

[7] On November 4, 1974, a civil rights action under 42 U.S.C. 1983 had been filed by 17 inmates at Norfolk. The complaint contended that plaintiffs' removal from the general population at Norfolk and their placement in administrative detention constituted punishment without due process of law and violated their rights under the Sixth and Fourteenth Amendments. The inmates sought a declaratory judgment, an order requiring Superintendent Meachum to return them to the general prison population, expungement from their records of any disciplinary reports, and punitive and compensatory damages.

and by transferring them to other institutions as punishment without adequate notice and hearing.[8] Respondents each sought $1,000 compensatory and $10,000 punitive damages, declaratory relief, and an injunction requiring petitioners to return them to Norfolk until more extensive hearings had been held.[9]

[8] Respondents sought to represent the class of all others similarly situated, but the district court declined to certify the case as a class action. Pet. App. 17.

[9] There is a substantial question whether this case is properly before the Court. The prisoners' civil rights action contended that procedures in effect throughout the Massachusetts prison system are unconstitutional. The amended complaint specifically attacked the adequacy of Departmental Order 4400.1. The district court also apparently concluded that Commissioner's Bulletin 82-1, which establishes procedures to be used before disciplinary boards, is defective because it extends those procedures to disciplinary segregation but not to transfers (Pet. App. 23).

Constitutional challenges seeking injunctions against state regulations of statewide applicability must be heard by district courts of three judges. 28 U.S.C. 2281. Many of the in-prison due process cases that have been considered by this Court have been heard on appeal from a three-judge district court. See, *e.g.*, *Pell* v. *Procunier*, 417 U.S. 817; *Procunier* v. *Martinez*, 416 U.S. 396. (Other cases, such as *Morrissey* v. *Brewer*, 408 U.S. 471, and *Gagnon* v. *Scarpelli*, 411 U.S. 778, arose in *habeas corpus*; no injunction was sought.) In an exhaustive discussion of the applicability of Section 2281 to due process challenges to prison conditions and regulations, the Fifth Circuit has unanimously held *en banc* that in situations of this sort a three-judge court must be convened. See *Sands* v. *Wainwright*, 491 F.2d 417, certiorari denied *sub nom. Guajardo* v. *Estelle*, 416 U.S. 992. Even if the practices under attack are "permitted" rather than "compelled" by the existing reg-

The district court held that petitioners' transfers exposed them to conditions of confinement significantly less advantageous than those they had enjoyed at Norfolk (Pet. App. 20). Concluding that the transfers were essentially disciplinary in nature (*ibid.*), the court held that petitioners were required to furnish respondents with pre-transfer hearings similar to those required by this Court (see *Wolff* v. *McDonnell*, 418 U.S. 539) for loss of good time credits accumulated under state law. The district court found that those procedures had not been observed here: (1) respondents were not given a summary of the information provided by the informants and relied upon by the classification board; and (2) respondents were not given a pre-hearing description of the nature of the alleged infractions adequate to allow them to prepare a defense.[10]

The district court entered a "preliminary order" directing petitioners to return respondents to the general population at Norfolk until they had been accorded a hearing in conformity with regulations then in force for disciplinary hearings at Walpole (Pet. App. 23). Petitioners also were ordered to promulgate regulations, to be reviewed by the court, establishing procedures that would govern future transfer hearings involving informant testimony[11] (*ibid.*).

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ulations, a three-judge court still would appear to be required. See *Sands* v. *Wainwright, supra*, 491 F.2d at 427-429; *Gilmore* v. *Lynch*, 400 F.2d 228 (C.A. 9), certiorari denied, 393 U.S. 1092; *McCarty* v. *Woodson*, 465 F.2d 822 (C.A. 10). Cf. *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290, 292. But cf. *Phillips* v. *United States*, 312 U.S. 246. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964).

It may be that the practices followed in respondents' transfer hearings in Norfolk are not followed statewide. If that is so, a three-judge court would be unnecessary. *Wolff* v. *McDonnell*, 418 U.S. 539, 542, n. 1; *Board of Regents* v. *New Left Education Project*, 404 U.S. 541. The fact that institutions such as Walpole have adopted supplemental procedures for use by disciplinary (but not necessarily classification) boards (see Pet. App. 20-23, 35-36) may indicate the lack of a uniform statewide practice. On the other hand, the fact that the State's commissioner of corrections considers an appeal from a transfer decision in any prison may indicate that the practice is statewide. Neither the district court nor the court of appeals passed upon this matter.

However that may be, we do not pursue the questions further, for the federal government has no independent interest in their resolution.

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[10] Superintendent Meachum stated in an affidavit (Pet. App. 26) that giving respondents a more detailed description would have created a substantial risk of revealing the identity of the informants and would have placed their lives in danger. Meachum further stated that no fires had been set after the removal of respondents and others from the general population at Norfolk, and that he believed that if respondents were returned to the general population at Norfolk there would be a very great risk of further disruption.

[11] The court's order required these regulations to conform with existing regulations at Walpole and with the order of the court in *Daigle* v. *Hall*, 387 F. Supp. 652 (D. Mass.). The Walpole regulations, also known as Institution Order 4310, require that if testimony is taken in the prisoner's absence before a disciplinary board (but not a classification board), then the presiding officer must give the inmate a summary of the information in question and state the board's reason for such protective action (Pet. App. 21). In *Daigle*, the court held that before an inmate could receive a classification that resulted in an adverse change in conditions of confinement he must receive a *Wolff*-type hearing.

The district court scheduled a future hearing on the claim for damages and on the various claims of eleven other plaintiffs.

3. A divided court of appeals affirmed (Pet. App. 28-41). It held that transfers from medium to maximum security institutions involve such "significant modification of the overall conditions of confinement" as to affect "the 'liberty' protected by the Fourteenth Amendment" (Pet. App. 34) and therefore that prisoners may not be deprived of their interests in remaining in a particular prison without due process of law.

Turning to the question of what process is due, the court held that hearings should be similar to those required by *Wolff* v. *McDonnell*, *supra*, for loss of good time. Under that standard the hearings given respondents were held to be defective. The court rejected petitioners' argument that the informants' information had been withheld to protect the informants; it observed that because the State provides such information for disciplinary hearings at Walpole, it cannot "even in the exercise of the discretion recognized in *Wolff*" deny similar procedures to those imprisoned at Norfolk (Pet. App. 36).

Judge Campbell dissented (Pet. App. 37-41), disagreeing with the majority's conclusion that prison transfers affect a "liberty" or "property" interest of an inmate. In Judge Campbell's view, changes in conditions of confinement, such as those involved here, do not implicate "liberties" of a prisoner but "fall within the state's general right to confine, safeguard,

and rehabilitate" (Pet. App. 39), and since prisoners have no legitimate claim of entitlement to remain in a prison where they have been placed, proceedings leading to their transfer need not comply with the Due Process Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case should be controlled by the same principles that, we have argued, govern *Montanye* v. *Haymes*, No. 74-520, certiorari granted, 422 U.S. 1055. Both cases present the question whether the Due Process Clause applies to the transfer of a prisoner from one place of incarceration to another. Here, unlike the case in *Montanye*, respondents were transferred to institutions where they would be placed in closer custody. In our view, this distinction does not call for a different result. Our argument that the Due Process Clause requires no notice or hearing on the propriety of a disciplinary transfer is set forth in our brief in *Montanye*, and we summarize it here. We then discuss the differences between this case and *Montanye*.

1. The Due Process Clause applies only in those circumstances in which governmental action deprives an individual of "liberty" or "property." Thus an evaluation of respondents' claim must begin with an inquiry into whether respondents were deprived of liberty or property. This inquiry does not turn, as the court of appeals held, on the gravity of the deprivation, but rather looks to the characteristics of the asserted interest.

Removing a prisoner from a prison into which he has been placed does not deprive him of liberty.[12] He was deprived of his liberty upon conviction, sentence, and incarceration. The very fact of his conviction for a crime, and the legitimate placement of his person into the hands of a custodian who will be responsible for his safekeeping and the supervision of the most intimate details of his life, extinguishes any liberty interest he may possess in selecting his place of residence. The prisoner therefore is not deprived of his liberty by being moved from one prison to another.

The Constitution does not create a liberty interest in being free of the potentially less advantageous circumstances of a different prison, even if the difference amounts to "grievous loss." The conviction and authorized incarceration of any person entitles his custodian to expose him to at least that range of custodial conditions reasonably anticipated by the judge pronouncing the sentence, so long as those conditions do not independently violate the Eighth Amendment.

Certainly a prisoner has an "interest" in remaining in a prison the conditions of which he prefers to those of some alternative prison. But that interest is not constitutionally cognizable as a "liberty" interest. The loose constellation of constitutionally based values that underlies the analysis of claims of "liberty" does not pertain to the day-to-day living conditions of persons lawfully confined. A prisoner's interests relating to the identity or physical location of his place of con-

[12] An expanded version of this argument appears at pages 14-30 of our brief in *Montanye*.

finement are founded not on constitutional concepts of liberty but on the statutes, regulations, and rules that govern the terms and conditions of his confinement. His interests are no more expansive than those established by such statutes, regulations, and rules, and are more closely related to "property" than to "liberty."

This Court's decisions make clear that a legitimate claim of entitlement under a statute, regulation, or rule warranting the procedural protections of due process exists only when the State has bound itself to take, or refrain from taking, specified actions on the basis of determinable facts. As Mr. Justice White noted in his concurring and dissenting opinion in *Arnett* v. *Kennedy*, 416 U.S. 134, 181:

> Where Executive discretion is not limited, there is no need for a hearing. In the latter event, where the statute has provided * * * no conditions at all, * * * no hearing is required.

It is likewise clear that a legitimate claim of entitlement arises only from positive law and not from the individual's unilateral expectations.

Under Massachusetts (and federal) law, the decision where to confine a prisoner is completely discretionary.[13] No set of facts respondents could prove or attempt to prove would entitle them to remain in an institution where they had temporarily been placed.

[13] The Bureau of Prisons "possesses the absolute authority, absent a showing of abuse of discretion, to designate the place of a prisoner's confinement and to administer transfer matters." *Clay* v. *Henderson*, 524 F.2d 921, 924 (C.A. 5).

Even if a prisoner were able to prove, in connection with a proposed disciplinary transfer, that he was innocent of any infraction of the prison's rules, prison officials still would retain discretionary authority to effect the transfer. Because decisions concerning institutional placement are not governed by any particular controvertible facts but instead are discretionary, respondents could under no circumstances have a legitimate claim of entitlement either to remain in one prison or to be moved to another. Accordingly, respondents have no constitutionally protected liberty or property interest in the place of their confinement; respondents' only "interest" is a hope or expectation to be confined in whatever prison he deems most advantageous to himself. But the Constitution does not require that any particular procedures be used before a State acts to disappoint an individual's unilateral expectations.

Nor does any constitutionally protected interest arise from the mere fact that a prisoner's transfer may be motivated by disciplinary considerations. Where "punishment" does not amount to a deprivation of constitutionally protected liberty or property, the procedural protections of due process do not apply.

2. Even when a prisoner has been deprived of a liberty or property interest, it is necessary to examine all interests at stake in order to determine how much "process" is due. We submit that even if a prisoner's transfer from one place of incarceration to another does implicate his liberty or property, the Court should hold that procedures less formal than notice

and opportunity for personal hearing are adequate to accommodate the legitimate interests of the prisoner and the competing interests of prison administration."[14]

If it were reasonably feasible to distinguish between a disciplinary transfer and a nondisciplinary or administrative transfer, it might be appropriate to strike the constitutional balance by providing the same procedural protections that are currently provided in connection with punitive sanctions such as loss of good time. See *Wolff* v. *McDonnell*, 418 U.S. 539. But disciplinary and administrative "reasons" are inextricably intertwined in most transfer decisions; a conscientious prison administrator, seeking to place a prisoner in the institution most likely to provide a satisfactory mixture of confinement, punishment, and rehabilitative opportunities, will of course consider the prisoner's record of behavior and compliance with prison rules. A distinction between disciplinary and administrative transfers therefore would be difficult to draw in practice, and even more difficult for the judiciary to administer on a case-by-case, *post hoc* basis, for in almost every prisoner's record there will be some incident upon which he could base a colorable claim that the transfer was intended to punish him. In short order, prison officials could well be compelled to adopt uniform and elaborate procedures for all transfers in order to mini-

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[14] An expanded version of this argument appears at pages 30-47 of our brief in *Montanye*.

mize disputes and litigation and preserve a semblance of order in decision-making. That result would, we believe, be most unfortunate, for there are compelling reasons, applicable to both administrative and disciplinary transfers, for allowing such decisions to be made informally.

The range of reasons for which an inmate may be transferred is quite broad. These include the initial classification decision to transfer an inmate to an institution apparently most suitable for the inmate; placement in an institution nearer the offender's release point; placement in an institution more appropriate to the length of time remaining to be served; placement in an institution containing more appropriate training or medical facilities; removal from an institution to which adjustment has been poor; transfers to reduce excessive population or increase deficient population; and removal for the safety of the transferred inmate or other inmates. Many of these causes for transfer do not turn upon objective inmate-specific facts of the sort most appropriate to trial-type determination. Some of them require only the determination of "legislative" facts with regard to which the inmate could offer little of importance. Others may offer appropriate occasions for entertaining the inmate's views, but these may be obtained without a formal adversarial hearing in every case. Other transfers are made because of suspicions that are incapable of objective proof in the particular case but nevertheless justify action.

Of course, even in many of the foregoing categories, inmate-specific facts may to some extent be relevant to the transfer decision, and hearings would on occasion operate to prevent a transfer prompted in part by a mistaken view as to those facts. But it is the judgment of prison authorities that the institutional costs of providing procedures to reduce the risks of mistakes of this sort outweigh the benefits to be derived from such procedures.

Provision of a trial-type hearing on every transfer occasion does not necessarily increase the welfare of prisoners as a group. It has been contended with some cogency that converting the relationship between the inmate and his custodian into a formally "adversarial" one may interfere with the rehabilitative goal of these institutions and make prison life more acrimonious than is otherwise necessary. Notice of the transfer may increase the probability that inmates, disappointed by the prospect and despairing of their ability to prevent it, may act violently toward their custodians or other inmates.

What is more, to the extent a hearing will operate to keep within a particular prison one who otherwise would leave, it also will keep out of the presumably "more desirable" institution one who otherwise would gain entry: one inmate's gain is another's loss. Finally, even when a specific disciplinary infraction is alleged, the hearing could not usefully explore the wisdom of making a transfer decision, for administrators retain discretion to transfer despite the lack of transgression. Accordingly, we submit, the Due

Process Clause should not be held to require notice and opportunity for a hearing when prison administrators do no more than allocate their charges to whatever prison, and for whatever constitutionally permissible reason, the administrators deem best for the prisoner and the prison system.

3. All of these arguments apply as well to transfers to more secure institutions. A prisoner is "deprived" only of the conditions he enjoyed prior to the transfer. If those conditions are not liberty or property, the Due Process Clause does not apply. Neither the court of appeals nor respondent has suggested any method by which the identity or security classification of the transferee prison can influence whether petitioner had a legitimate claim of entitlement to remain where he was once housed.

The court of appeals thought that a "liberty" interest was established because respondents were exposed to closer custody in the receiving prisons than at Norfolk. This confuses the inquiry into "grievous loss" (which is measured by the extent of the change in conditions) with the question whether the prisoner had a legitimate claim of entitlement to what was taken away. Only if he has such a claim is it necessary to address the subsidiary "grievous loss" question.

4. Nor is our analysis affected by the fact that transfers to maximum security institutions may affect the likelihood of respondents' being granted parole. An inmate's desire to be paroled in the future is itself neither liberty nor property, and therefore

the Due Process Clause does not apply to events that may disappoint the inmate's expectations.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT REQUIRE NOTICE AND OPPORTUNITY FOR HEARING ON THE PROPRIETY OF A TRANSFER OF A PRISONER BETWEEN INSTITUTIONS OF DIFFERENT SECURITY CLASSIFICATIONS

B. A Transfer to Closer Custody Does Not Deprive a Prisoner of "Liberty" or "Property"

The foundation for the holding of the court of appeals that transfers between institutions of different security classifications require procedural due process is its observation (Pet. App. 34) that such transfers involve "not a simple loss of privileges * * * but a significant modification of the overall conditions of confinement." The court held that respondents had been deprived of "liberty" because (Pet. App. 32) "the detriment worked by an intrastate transfer from a medium-security institution to a maximum-security prison is *serious enough* to trigger the application of due process protections" (emphasis added).

We submit that the court of appeals has confused the two inquiries essential in due process cases: first, whether a liberty or property interest is involved, and, second, whether the deprivation amounts to "grievous loss." The court of appeals appears to have believed that all deprivations involving a serious or grievous loss must, for that reason, affect a "liberty" interest. That is incorrect. "[T]o determine whether due proc-

ess requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (emphasis in original). See also *Goss* v. *Lopez*, 419 U.S. 565, 572-576.

The "*nature* of the interest at stake" is the same regardless of the destination of the transferred prisoner. He has been "deprived" of the conditions prevailing in the place where he used to be confined. That deprivation is the same whether he is transferred to another prison of the same security level or to a prison using greater security precautions. The *amount* of loss is greater in the latter case, but the *nature* of the loss is the same. For that reason, the presence or absence of a "liberty" interest in a continuation of residence at the old institution must be determined without regard to the identity of the receiving institution.

The test invoked by the court of appeals—"a significant modification of the overall conditions of confinement"—was derived from a footnote in *Wolff* v. *McDonnell*, *supra*, 418 U.S. at 571-572, n. 19. That footnote compared the effects of deprivation of good time with those of imposition of solitary confinement. The Court concluded from this comparison that because solitary confinement "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct" (*ibid.*), the Constitution would require the same minimum procedural safeguards as are required for loss of good time. But the source of the prisoner's interest in avoiding solitary confinement was that the State had bound itself by regulations and a course of practice (as in *Perry* v. *Sindermann*, 408 U.S. 593) to impose solitary confinement only on account of misconduct. That practice created a legitimate claim of entitlement and, because imposition of solitary confinement would also create "grievous loss," minimum procedural protections were required.

The basis for a similar conclusion is lacking here—neither Massachusetts nor the federal government has bound itself by statute, rule, or settled course of practice to transfer a prisoner only because of misbehavior. Indeed, the contrary is the case. Most transfers within the federal system are for administrative rather than disciplinary reasons (see *Montanye* Br. 2-3, 38-41). A prisoner therefore has no reasonable expectation, and therefore no legitimate claim of entitlement, to remain in a particular prison unless and until he violates prison rules. Indeed, in this case the transfers of respondents appear to have been based upon "suspicion" rather than upon facts "proved" according to judicial standards. As we argued in *Montanye* (Br. 40-41, 45-47), the ability to make transfers "on suspicion" is a necessary part of the powers of prison administrators.

In the absence of some legitimate claim of entitlement on the inmate's part to remain in a particular prison, he has no liberty interest in doing so. The footnote discussion of solitary confinement in *Wolff*

is consistent with this analysis and does not support the judgment of the court of appeals.[15]

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[15] What is more, solitary confinement is radically unlike the normal confinement conditions in which a prisoner is placed. Its basic ingredient is isolation from human contact, an isolation that affects an inmate psychologically as well as physically. *Sostre* v. *McGinnis*, 442 F.2d 178, 190 (C.A. 2), certiorari denied *sub nom. Sostre* v. *Oswald*, 404 U.S. 1049. An inmate sent to solitary confinement usually cannot acquire good time, cannot possess property, cannot participate in any prison programs, is closely supervised, and his movement is curtailed. Solitary confinement thus produces a loss of freedom apart from that taken away by incarceration in general, in even the most secure institutions. In the federal system, an inmate can be placed disciplinary segregation (the federal equivalent of solitary confinement) only if he poses a serious threat to life, property, himself, staff, other inmates, or the security of the institution. Bureau of Prisons Policy Statement No. 7400.5D (1975). In view of the nature of solitary confinement it could be argued that it is so great a change in the quality of life, beyond whatever conditions were authorized by the original judgment of conviction, that it produces a loss of "liberty" even if there is no rule or settled course of practice reserving its use for prisoners who have violated the institution's rules.

Prison transfers to maximum security institutions do not implicate interests of similar magnitude. The major difference between medium and maximum security institutions in the federal prison system is in size and security. Most maximum security institutions are large and walled-in, while most medium security institutions are smaller and fenced-in. Housing in maximum security prisons is generally in multiple occupancy cell houses, although housing can also be in open dormitories and individual cells. Housing at medium security prisons varies considerably, both within and among institutions. Inmates may be housed in open dormitories, multiple occupancy cubicles, cells, or dormitory rooms.

A large percentage of inmates at maximum security institutions are confined in "close custody", while at medium security institutions a greater percentage of inmates are confined in "medium custody" or "minimum custody". Both types of institutions have inmates in all three custody levels. Maximum security institutions usually house older adults, those who have longer sentences, or those convicted of more serious offenses—that is, inmates who may be considered greater security risks.

In the federal system both types of institutions have an extensive range of programs available to inmates, including educational, vocational, recreational, group and individual counseling, and prison industries. In maximum security prisons the programs are more oriented to industrial work. A large percentage of the inmates in both types of federal institutions participate in these programs.

While transfers between institutions of different security levels thus may involve some changes in conditions of confinement, they do not occasion the type of changes in conditions of confinement created by solitary confinement.

Just as no "liberty" interest is implicated in the transfer of prisoners between prisons of different security levels, so a prisoner has no "property" interest in remaining in a particular place or a particular condition of confinement.

The court of appeals suggested (Pet. App. 34, n. 6) that the creation of a prison system containing institutions with divergent conditions of confinement is similar to the creation by the State of the good time credits involved in *Wolff*. We disagree. In *Wolff* the State had created by statute an entitlement to good time and had specified that good time was to be forfeited only for serious misbehavior. The creation of a prison system with institutions of various security classification is not analogous, because the State has not ordained any facts or set of facts that will entitle the prisoner to be placed in,

or to remain in, a particular institution. A good time credit system creates entitlements vesting in the inmate; the entitlements are revocable only when certain events come to pass. See 18 U.S.C. 4161 and 4165. A diversified system of penal institutions, on the other hand, is established so that the State can best attain its ends: incarceration, confinement, deterrence and (if possible) rehabilitation. Unless such a system is created with the provision that inmates are to be incarcerated at a specific level of custody and are not to be transferred except on the basis of certain determinable facts, no property right or legitimate claim of entitlement is created.[16]

The federal government has created no such claim of entitlement to a specific place or condition of confinement. The governing federal statutes (18 U.S.C. 4081 and 4082(b)) expressly grant federal prison officials full discretion over the placement and transfer of prisoners. See *Clay* v. *Henderson*, 524 F.2d 921, 924 (C.A. 5); *Moore* v. *Attorney General*, 473 F.2d 1375 (C.A. 5); *Holland* v. *Ciccone*, 386 F.2d 825 (C.A. 8), certiorari denied, 390 U.S. 1045. Congress has specifically declared that, for federal

[16] A number of courts have held that *any* change in the level of custody, even within an institution, must be preceded by a full *Wolff*-type hearing. See *Lokey* v. *Richardson*, C.A. 9, No. 74-1256, decided December 6, 1975; *Carlo* v. *Gunter*, 520 F.2d 1293 (C.A. 1); *Graham* v. *State Department of Correction*, 392 F. Supp. 1262 (W.D.N.C.); *Schumate* v. *People of the State of New York*, 373 F. Supp. 1166 (S.D.N.Y.). For the reasons discussed in the text and in our brief in *Montayne*, we submit that these cases were incorrectly decided.

prisoners, transfers shall not be conditioned on any particular set of facts. This, in short, is not a case like *Wolff* "where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits *accumulated under state law*, although those benefits were not mandated by the Constitution." *Goss* v. *Lopez*, *supra*, 419 U.S. at 573 (emphasis added).[17]

[17] At least one court of appeals has rejected an argument similar to the one we have made here, holding that it "attempts to resurrect the now-discredited right-privilege dichotomy as an analytical approach to due process * * *." *Cardaropoli* v. *Norton*, 523 F.2d 990, 995, n. 11 (C.A. 2). We submit that this characterization misconceives the thrust of our argument.

Under the right-privilege distinction, benefits created by substantive constitutional guarantees were "rights," and those created by statute were "privileges" subject to unfettered governmental control. A State could defend a claim that it had denied due process of law by answering that, because the State was not constitutionally required to give the benefit in question to *anyone*, plaintiff could not complain that he had not received it, no matter how arbitrary the State's decision and no matter what sort of discrimination the State may have practiced. Thus, even entitlements founded on statutory guarantees were not enforceable in practice.

The question whether there is a "liberty" or "property" interest—an inquiry established by the Constitution itself—is quite different. This Court held in *Roth*, *supra*, that "property" interests are founded only upon statutes, rules, or settled course of practice. The question in a case of this sort, therefore, is whether any statute, rule, or practice has created for the prisoner a legitimate claim of entitlement contingent upon specific facts. If it has done so, the Due Process Clause applies even though the entitlement may be a "privilege" that could be revoked at any time by altering the rules that created the entitlement. For example, one deprived of welfare is protected by the Due Process Clause. *Goldberg* v. *Kelly*, 397 U.S. 254. And if a State provides that any individual who is "unem-

B. The Fact That a Transfer May Later Be Taken Into Account in Making a Decision Whether to Release an Inmate Does Not Mean That the Transfer Itself Involves "Liberty" or "Property"

As a separate ground for its holding that a transfer deprives a prisoner of "liberty," the court of appeals observed that prison transfers may affect the likelihood of parole. This was based on an agreement reached by the parties that "determination[s] to transfer Plaintiffs, and the basis therefore, will be noted on their institutional record and will be considered by the Parole Board * * *" (Pet. App. 33). We submit, to the contrary, that the fact that transfers may be considered in making parole determina-

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ployed" shall be entitled to receive unemployment compensation, the expectation of benefits would be a property interest, because benefits would be contingent upon provable facts. An applicant for unemployment benefits therefore would be entitled to due process of law. Cf. *Geneva Towers Tenants Organization* v. *Federated Mortgage Investors*, 504 F.2d 483, 495-496 (C.A. 9) (Hufstedler, J., dissenting); *Raper* v. *Lucey*, 488 F.2d 748 (C.A. 1) (application for a driver's license). (What process would be "due" in these cases would depend, of course, upon the balance between the interests of the individual and those of the government.)

Under our argument, the applicability of the Due Process Clause turns not upon the *source* of the rule arguably creating a claim of entitlement, or upon the label attached to the claim, but upon whether there *is* a legitimate claim of entitlement—that is, whether any rule of law provides that inmate-specific facts entitle an inmate to remain in a particular prison or to defeat an attempt by his custodians to put him elsewhere. The right-privilege dichotomy depended upon the source of the rule in question; the inquiry into liberty or property looks to the nature of the entitlement created, and to whether there is a rule at all.

tions does not require that the transfer procedures comport with due process.

1. As we argued in our brief *amicus curiae* in *Weinstein* v. *Bradford*, No. 74-1287, vacated as moot, December 10, 1975, a prisoner's application for parole does not implicate the procedural protections of the Due Process Clause.[18] While a prisoner has an "interest" in being released on parole, that interest is neither "liberty" nor "property" until the release actually takes place. Prior to that time, the prisoner's desire to be released on parole is no more than a unilateral expectation on his part.

Denial of an application for parole does not deprive a prisoner of liberty. A prisoner is deprived of his liberty, for the full term of his sentence, upon conviction and incarceration. The prisoner who applies for parole stands in no danger of losing liberty; to the contrary, liberty is what he seeks. An adverse decision will merely continue him in his constitutionally valid confinement.

Nor does a prisoner have a property interest in parole, unless a State has made parole determinations that turn on certain determinable facts. Where parole is based on discretionary action (as it is in the federal system) no set of facts a prisoner could prove or

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[18] Copies of our brief in *Weinstein* are being furnished to the parties. The Solicitor General has authorized the filing of a brief as *amicus curiae* in *Scott* v. *Kentucky Parole Board*, No. 74-6438, certiorari granted, December 15, 1975, which presents the *Weinstein* issue.

attempt to prove would entitle him to parole. In such a situation there can be no legitimate claim of entitlement to be released on parole.

Since an application for parole therefore can be denied without a full hearing, it is permissible for the parole board to consider information generated without a full hearing.

2. Even if the Due Process Clause applies to the parole application process, prison transfers could be considered by a parole board whether or not the transfer decision had been made after a *Wolff*-type hearing. If the Due Process Clause applies to parole release decisionmaking, a prisoner applying for parole would have a full opportunity for an oral hearing and a right to a statement of reasons for the board's decisions. At the hearing he could challenge the propriety of the transfer decision [19] or the weight to be given to that decision.

Under regulations now in effect, the United States Board of Parole grants an inmate a hearing on his parole application. 28 C.F.R. 2.13 (1975). The prisoner is interviewed by the hearing officer and may offer evidence in support of his parole request. This hearing gives an inmate the full opportunity to explain or challenge any transfer appearing on his record. It is also the practice of United States Board

[19] We would argue, in an appropriate case, that a transfer decision made after a full hearing is not open to reexamination in a later parole hearing. Cf. *Morrissey* v. *Brewer, supra*, 408 U.S. at 490. But this argument is inapplicable where the prisoner was transferred without a hearing.

of Parole hearing officers fully to investigate transfers before taking them into account in making their parole determinations. The Constitution plainly does not require that facts that could influence parole be determined twice after full hearings; a single hearing should suffice.

This argument is consistent with the usual practice in parole release hearings. The parole board receives and considers evidence from all sources and of all degrees of reliability. The board considers hearsay, documentary evidence, and so on. The prisoner then is free to challenge the accuracy or value of that evidence and to present contrary evidence. The evidence is not inadmissible merely because it has been generated by procedures other than notice and an opportunity for hearing.

3. Finally, even if the possibility of an adverse effect upon parole applications is enough to indicate that the transfer decision affects liberty or property, it does not follow that the transfer itself is invalid unless preceded by a *Wolff*-type hearing. It is possible to eliminate the effect upon parole by expunging a prisoner's records. As Judge Campbell observed (Pet. App. 41), if an adverse effect upon parole is the constitutional harm to be avoided, the goal can be achieved by forbidding "the use of the fact of transfer by the parole board unless the charges upon which the transfer was based were established in a manner comporting with due process." The transfers themselves, however, would not be open to attack. Therefore, even if the potential effect upon

parole means that the transfer hearings furnished to respondents were inadequate, the court of appeals has selected the wrong remedy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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